

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

ELLENSBURG WATER COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY and UNITED STATES
BUREAU OF RECLAMATION,

Respondents.

PCHB No. 86-153

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding.

The matter is an appeal from an Order of Department of Ecology, dated July 29, 1986, extending a withdrawal of waters from appropriation by the United States under RCW 90.40.030.

Appearances were as follows:

1. Donald H. Bond, Attorney at Law, for Appellant Ellensburg Water Company.

1 2. Charles B. Roe, Jr., Senior Assistant Attorney General for
2 Respondent State of Washington, Department of Ecology.

3 3. W. N. Dunlop, Attorney at Law, for Respondent United States,
4 Bureau of Reclamation.

5 The hearing was conducted at Lacey, Washington, on
6 November 1, 1988.

7 Gene Barker & Associates provided court reporting services.

8 The case was presented upon stipulated facts and agreed
9 exhibits. Counsel argued the case orally and submitted briefs.
10 Having heard or read the foregoing and being fully advised, the
11 Pollution Control Hearings Board makes these

12 FINDINGS OF FACT

13 I

14 This case involves a challenge to Washington State's extension of
15 a withdrawal of waters from appropriation under RCW 90.40.030. A
16 withdrawal of waters from appropriation under that statute preserves
17 the status quo during decision making by the United States as to
18 whether and to what extent there will be a reclamation project
19 utilizing such waters.

20 II

21 Federal reclamation projects are begun with a feasibility study.
22 Since 1966, Congress must authorize each feasibility study by
23 enactment of a statute. Public Law 89-72, 79 Stat. 213.

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III

In 1979, Congress enacted a statute authorizing a feasibility study of the Yakima River Basin Water Enhancement Project. Public Law 96-162 (S.585). The Senate Report explaining the measure states:

Recent drought conditions throughout the western United States and in particular the Yakima Valley, focused attention on the need for further efforts to both expand and assure existing water supplies in the basin. In addition, the physical scarcity of the basic resource contributed to conflicts over the apportionment of available supplies. S.585 is the result of efforts by the State of Washington in cooperation with local entities to identify potential multipurpose water resource development sites in the Yakima River Basin...

Preliminary figures indicate that of the total proposed storage capacity, 282,000 acre-feet would be for irrigation purposes, 225,000 acre-feet would be for fish and conservation, and the remainder would be for flood control. (Emphasis added.)

IV

In 1981, the United States Bureau of Reclamation (U. S. Bureau) notified the Washington State Department of Ecology (State DOE) that pursuant to the U. S. Reclamation Act of 1902, and acts amendatory thereof and supplementary thereto, the United States intended to make examinations and surveys for the utilization of the unappropriated waters of the Yakima River Basin for multi-purpose use. The State DOE then considered those waters to be withdrawn from appropriation by others for one year under the state law in question, RCW 90.40.030.

V

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2 Within the year, during 1982, the U. S. Bureau certified to the
3 State DOE that several projects identified by the Yakima River Basin
4 Water Enhancement Study, contemplated in the 1981 notice, appeared to
5 be feasible. The State DOE then considered the unappropriated waters
6 to be further withdrawn, under RCW 90.40.030, for a three year period
7 expiring January 18, 1985.

8 VI

9 In 1984, Congress enacted a statute, Sec. 109, P.L. 98-381,
10 providing as follows:

11 The Secretary of the Interior, acting
12 pursuant to Federal reclamation law (Act of
13 June 17, 1902, 32 Stat. 388, and Acts amendatory
14 thereof and supplementary thereto) and in
15 accordance with the Pacific Northwest Electric
16 Power Planning and conservation Act (94 Stat.
17 2697) is authorized to design, construct, operate,
18 and maintain fish passage facilities within the
19 Yakima River Basin, and to accept funds from any
20 entity, public or private, to design, construct,
21 operate and maintain such facilities.

22 VII

23 In November, 1984, the U. S. Bureau issued a Predesign Report
24 identifying fish passage and protective facilities throughout the
25 Yakima River Basin. The Report states:

26 The design of the fish passage and
27 protective facilities includes the flexibility of
28 operation within present flow allocation in the
29 Yakima River basin. The designs also anticipate
30 improved flows for the fishery resource at some
31 time in the future.

32 P. 2, paragraph 1.

VIII

Sites for the fish passage and protective facilities were located by the U. S. Bureau in Kittitas, Yakima and Benton Counties. Predesign Report, Table A, page b. Construction costs would total in excess of \$34 million with annual operating costs in excess of \$450 thousand. Id.

IX

By letter dated December 3, 1984, the U. S. Bureau applied to the State DOE for a further five-year extension of the withdrawal of the unappropriated waters of the Yakima River.

X

Notice of the U. S. Bureau's 1984 application for extension of withdrawal was published in legal newspapers in Kittitas and Yakima County. The notice was not published in Benton County.

XI

By letter dated July 20, 1986, the State DOE granted the U. S. Bureau's application for extension of the withdrawal of unappropriated waters in the Yakima River basin under RCW 90.40.030. Rather than the five year extension requested by the U. S. Bureau, however, the State DOE approved a three year extension to January 18, 1988.

XII

Ellensburg Water Company by notice timely filed, now appeals from the State DOE's 1986 extension of the withdrawal of unappropriated waters in the Yakima River Basin.

XIII

Nothing in this record proves or disproves the existence of unappropriated waters within the Yakima River basin. We note the pendency of State v. Acquavella in Yakima County Superior Court, a proceeding brought to adjudicate water rights in the Yakima River basin under RCW 90.03.110 et. seq.

XIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Chapter 90.40 RCW, entitled "Water Rights of U. S.", was enacted by the Washington State legislature in 1905 subsequent to the passage of the United States Reclamation Act of 1902. The intent of the state was to assure itself of the benefit of the federal reclamation program. As stated by Judge Driver in U. S. v. Anderson, 109 F. Supp. 755, p. 759 (1953):

"...in order for the State to receive the benefits of the Federal reclamation act, it was necessary for the State legislature to enact irrigation laws acceptable to the United States Reclamation Service."

II

The section of the state act at issue, RCW 90.40.030 provides as follows:

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90.40.030 Notice and certificate, effect of.
Whenever the secretary of the interior of the United States, or any officer of the United States duly authorized, shall notify the commissioner of public lands of this state that pursuant to the provisions of the act of congress approved June 17, 1902, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," or any amendment of said act or substitute therefor, the United States intends to make examinations or surveys for the utilization of certain specified waters, the waters so described shall not thereafter be subject to appropriation under any law of this state for a period of one year from and after the date of the receipt of such notice by such commissioner of public lands; but such notice shall not in any wise affect the appropriation of water theretofore in good faith initiated under any law of this state, but such appropriation may be completed in accordance with the law in the same manner and to the same extent as though such notice had not been give. No adverse claim to any of such waters initiated subsequent to the receipt by the commissioner of public lands of such notice shall be recognized, under the laws of this state, except as to such amount of waters described in such notice or certificate hereinafter provided as may be formally released in writing by a duly authorized officer of the United States. If the said secretary of the interior or other duly authorized officer of the United States shall, before the expiration of said period of one year, certify in writing to the said commissioner of public lands that the project contemplated in such notice appears to be feasible and that the investigation will be made in detail, the waters specified in such notice shall not be subject to appropriation under any law of this state for the further period of three years following the date of receipt of such certificate, and such further time as the commissioner of public lands may grant, upon application of the United States or one of its authorized officers and notice thereof first published once in each week for four

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1 consecutive weeks in a newspaper published in the
2 county where the works for the utilization of such
3 waters are to be constructed, and if such works
4 are to be in or extend into two or more counties,
5 then for the same period in a newspaper in each of
6 such counties: Provided, That in case such
7 certificate shall not be filed with said
8 commissioner of public lands within the period of
9 one year herein limited therefor the waters
10 specified in such notice shall, after the
11 expiration of said period of one year, become
12 unaffected by such notice and subject to
13 appropriation as they would have been had such
14 notice never been given: And provided further,
15 That in case such certificate be filed within said
16 one year and the United States does not authorize
17 the construction of works for the utilization of
18 such waters within said three years after the
19 filing of said certificate, then the waters
20 specified in such notice and certificate shall,
21 after the expiration of said last named period of
22 three years, become unaffected by such notice or
23 certificate and subject to appropriation as they
24 would have been had such notice never been given
25 and such certificate never filed.
26 (Emphasis added).

27 III

1 A withdrawal of waters from appropriation in favor of the United
2 States under RCW 90.40.030 confers a priority date as of that
3 withdrawal if and when the United States later appropriates the
4 waters. RCW 90.40.040. The withdrawal, therefore, operates as a
5 place-holder while reclamation planning proceeds through the federal
6 legislative and executive process, a process in which public debate
7 plays a vital role.

IV

1 In this case, the appellant contends that the statutory
2 place-holder has failed because the order, dated July 29, 1986,

1 extending the withdrawal was invalid. The appellant raises five main
2 contentions in support of its position. First, that the Order
3 purported to authorize an extension for works which were not to
4 utilize the unappropriated waters or were not within the scope of the
5 1981 notice or 1982 certificate. Second, that the withdrawn waters
6 are not "certain specified waters". Third, that the United States did
7 not authorize construction of works for utilization of the withdrawn
8 water within three years after the 1982 certificate. Fourth, that the
9 Order was not timely. Fifth, that statutory notice requirements for
10 the extension application were not met. We now take these up in turn.

11 V

12 Whether the Order authorizes an extension for works which are not
13 to utilize the unappropriated waters or were not within the scope of
14 the 1981 notice or 1982 certificate?

15 The U. S. Reclamation Act of 1902 as originally written only
16 referred to irrigation. However, the scope of the 1902 Act has been
17 subsequently expanded on numerous occasions. In 1906 the Secretary of
18 the Interior received the additional authority to provide water to
19 towns. 43 U.S.C. 567, and to develop electric power. 43 U.S.C. 522.
20 In 1911, the authority to serve water to non-project lands was
21 obtained. 43 U.S.C. 523. In 1939 authority was granted for municipal
22 and incidental purposes as well as sale of surplus power. 43 U.S.C.
23 485h(c). In 1958 authority was granted for fish and wildlife
24 conservation. 16 U.S.C. 661-664.

1 In this case, the 1979 Congressional Act authorizing the Yakima
2 River Basin Water Enhancement Project granted authority for studying
3 multipurpose development including fish and conservation development.
4 This multipurpose objective was stated expressly or by reference in
5 both the 1981 notice and 1982 certificate by the U. S. Bureau. The
6 fish passage and protective facilities contemplated by the foregoing
7 federal laws, notice and certificate are designed in anticipation of
8 the improved flows resulting from future water storage components of
9 the Yakima River Basin Water Enhancement Project.

10 The State DOE extension order authorizes an extension of
11 withdrawal for a multipurpose reclamation project. However, the fish
12 passage and protective facilities included within that project are
13 works which utilize the withdrawn waters, and are within the scope of
14 the 1981 notice and 1982 certificate. The extension order is
15 consistent with RCW 90.30.030 and valid in this respect.

16 VI

17 Whether the withdrawn waters are "certain specified waters"?

18 The withdrawal of "the unappropriated waters" of the Yakima River
19 basin is certain, specific and consistent with RCW 90.40.030.
20 Appellant's argument that the term "certain specified waters" in RCW
21 90.40.030 is limited to waters only to be withdrawn for irrigation has
22 been overtaken by the advancement of federal reclamation law as set
23 forth in Conclusion of Law V, above. The many supplements to the
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1 Reclamation Law of 1902 have established authority for multipurpose
2 reclamation projects. Advancement in federal law was both foreseen and
3 accomodated by the language of RCW 90.40.030 authorizing withdrawal of
4 water pursuant to the Reclamation Act of 1982 "or any amendment of
5 said act or substitute therefor".

6 The extension order withdrew "certain specified waters", and in
7 this respect is consistent with RCW 90.40.030 and valid.

8 VII

9 Whether the United States authorized construction of works for
10 utilization of the withdrawn water within three years after the 1982
11 certificate?

12 Respondents, State DOE and U. S. Bureau, raise a preliminary
13 issue as to whether the United States must authorize construction of
14 works within the three years following the certificate under RCW
15 90.40.030. The language of RCW 90.40.030 provides, pertinent to this
16 issue:

17 If the said Secretary of the Interior . . . shall,
18 before the expiration of said period of one year,
19 certify in writing to the said commissioner of
20 such public lands that the project contemplated in
21 such notice appears to be feasible and that the
22 investigation will be made in detail, the waters
23 specified in such notice shall not be subject to
24 appropriation under any law of this state for the
25 further period of three years following the date
26 receipt of such certificate, and such further time
27 as the commissioner of public lands may grant,
upon application of the United States or some one
of its authorized officers and notice thereof
first published once in each week or four
consecutive weeks in newspaper published in the
county where the works for the utilization of such
waters are to be constructed, . . . And provided

1 further, That in case such certificate be filed
2 within said one year and the United States does
3 not authorize the construction of works for the
4 utilization of such waters within said three years
5 after the filing of said certificate, then the
6 waters specified in such notice and certificate
7 shall, after expiration of said last name period
8 of three years, become unaffected by such notice
9 or certificate and subject to appropriation as
10 they would have been had such notice never been
11 given and such certificate never filed.

12 While the authority to withdraw waters beyond three years is granted
13 by the first clause underlined above, that authority is subject to the
14 proviso, also underlined, that the United States must authorize
15 construction within the three years. The language is unambiguous in
16 providing that the withdrawn waters become subject to appropriation
17 where the United States does not authorize construction of works for
18 the utilization of the withdrawn waters within three years of the
19 certificate. In this case, however, we have concluded that fish
20 passage and protective facilities are works for utilization of the
21 withdrawn waters (Conclusion of Law V, supra). These were authorized
22 for construction by the United States in 1984 (Finding of Fact VI,
23 supra) and thus within three years of the 1982 certificate.

24 The extension order was issued after the United States authorized
25 construction of works for utilization of the withdrawn water within
26 three years of the 1982 certificate, and in this respect the order is
27 consistent with RCW 9.40.030 and valid.

VIII

Whether the extension order was timely?

Appellant contends that absent any extension granted prior to January 18, 1985, the withdrawn waters become subject to appropriation. We disagree. Nothing in RCW 90.40.030 requires that extensions of the three year withdrawal be approved within the three years, which in this case ended on January 18, 1985.

Moreover, we read RCW 90.40.030 to be within and governed by the State Administrative Procedure Act (APA) formerly Chapter 34.04 RCW and now Chapter 34.05 RCW. The APA indicates that:

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, an existing full, temporary or provisional license does not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court. RCW 34.04.170(1) and RCW 34.05.422(3).

The term license is defined by the APA as:

...the whole or part of any agency permit, certificate, approval, registration, charter or any form of permission required by law, including agency rule, to engage in any activity... RCW 34.04.010(4) and See RCW 34.05.010(9)(a).

Lastly, the APA provides that:

All acts or parts of acts, whether special or comprehensive in nature which are inconsistent with the provisions of this chapter, whether in the review procedures which they establish or

1 otherwise, are hereby repealed but such repeal
2 shall not affect pending proceedings.
3 RCW 34.04.910 (enacted 1967).

4 In this case the withdrawal constitutes a form of permission required
5 by law and is a license. The licensee, U. S. Bureau applied timely,
6 before January 18, 1985, for renewal. The existing license did not
7 expire on January 18, 1985, but remained in force until the final
8 determination by the State DOE on U. S. Bureau's timely application.
9 RCW 34.04.170(1) and RCW 34.05.422(3).

10 The extension order was timely, and in this respect is
11 consistent with RCW 90.40.030 and valid.

12 IX

13 Whether the statutory notice requirements for the extension
14 application were met?

15 It is undisputed that notice of the U. S. Bureau's extension
16 application was not published in Benton County, though it was
17 published in Kittitas County and Yakima County.

18 The statutory language is clear and unequivocal. Notice is to
19 be published in a newspaper of each county where the works are to be
20 constructed. Such notice is to be once a week for four consecutive
21 weeks. RCW 90.40.030.

22 As the Supreme Court in 1985 has clearly stated:

23 The purpose of notice statutes is to apprise fairly
24 and sufficiently those who may be affected of the
25 nature and character of an action so they may
26 intelligently prepare for the hearing. Barrie v.
27 Kitsap County, 84 Wn.2d 579, 527 P.2d 1377 (1974).
Nisqually Delta Association v. DuPont, 103 Wn.2d 720,
696 P.2d 1222 (1985).

1 Here there was simply no notice publication in Benton County
2 whatsoever. The statutory requirement was not complied with.
3 Publicity cannot supplant the statutory notice requirement. Davis v.
4 Gibbs, 39 Wn.2d 481, 236 P.2d 545 (1951).

5 Respondents argue that the doctrine of substantial compliance
6 should be applied. Yet we do not reach that because there is no
7 evidence that there was an attempt to publish the notice in the Benton
8 County newspaper. See Davis, supra. The residents of Benton County
9 have not been fairly apprised of the proposed action. See South Point
10 Coalition, et al. v. Jefferson County, et al., SHB 86-47, Order
11 Granting Summary Judgment (May 26, 1987). The consequence of failed
12 notice in Benton County, however, is not to render the extension order
13 universally invalid. Rather the lack of notice in Benton County
14 renders the extension order invalid there and requires remand to the
15 State DOE for the purpose of publishing notice in Benton County. The
16 application of the U. S. Bureau must then be re-decided in light of
17 any comment flowing from the notice. Because the State DOE's
18 extension order was appealed, it is not final until re-decided
19 pursuant to remand. The prior withdrawal extends to the time of the
20 final determination after remand, including consequent appeals, if
21 any. See Conclusion of Law VIII, supra.

22 The deficiency of notice in Benton County does not affect State
23 DOE's approval with regard to Kittitas County and Yakima County. The
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1 statutory notice requirements were met as to Kittitas County and
2 Yakima County and in this respect the extension order is consistent
3 with RCW 90.40.030 and valid.

4 X

5 In summary, the challenged order authorized an extension for
6 multipurpose works to utilize unappropriated waters of the Yakima
7 River basin. These works were within the 1981 notice and 1982
8 certificate. The unappropriated waters are "certain specified waters"
9 as that term is used in RCW 90.40.030. The United States timely
10 authorized construction of works for utilization of the withdrawn
11 waters. The State timely issued the order. The notice of the United
12 States application was deficient in Benton County, only. The order
13 should be affirmed as to Kittitas County and Yakima County. The order
14 should be remanded for notice as required by statute and
15 re-determination of the application as to Benton County. The existing
16 withdrawal does not expire in Benton County until the re-determination
17 and appeals thereof, if any.

18 XI


19 Any Finding of Fact which is deemed to be a Conclusion of Law is
20 hereby adopted as such. From these Conclusions of Law, the Board
21 enters this

ORDER

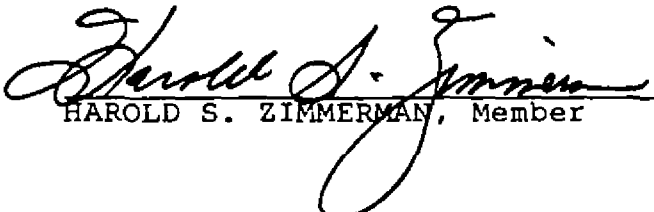
The Order of Department of Ecology dated July 29, 1986, is affirmed as to Kittitas County and Yakima County. The same is remanded as to Benton County for notice as required by RCW 90.40.030 and for re-determination of the application thereafter. The existing water withdrawal in Benton County shall not expire until the re-determination and appeals thereof, if any.


DONE at Lacey, Washington, this 2nd day of February, 1990.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Chair


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member


WILLIAM A. HARRISON
Administrative Appeals Judge